Supreme Court, U.S.
FILED
JUL 20 1992
OFFICE OF THE CLERK

(2)

No. 91-1799

In the Supreme Court of the United States

OCTOBER TERM, 1992

CLEMENT J. PACYNA, PETITIONER

v.

JOHN O. MARSH, JR., SECRETARY OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

WILLIAM KANTER
MARY K. DOYLE
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the district court abused its discretion by refusing to grant relief from a final judgment under Rule 60(b)(4) and (6), Fed. R. Civ. P., in this case, which has been before this Court on three other petitions for certiorari.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Discussion	8
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Allen v. *McCurry*, 449 U.S. 90 (1980)	10
American Surety Co. v. *Baldwin*, 287 U.S. 156 (1932)	10
Insurance Corp. v. *Compagnie des Bauxites*, 456 U.S. 694 (1982)	10
Mitchell v. *United States*, 930 F.2d 893 (Fed. Cir. 1991)	11
Nemaizer v. *Baker*, 793 F.2d 58 (2d Cir. 1986)	10, 11
Pacyna v. *Marsh*:	
474 U.S. 1078 (1986)	5
481 U.S. 1048 (1987)	6
483 U.S. 1034 (1987)	6
493 U.S. 819 (1989)	7, 9
493 U.S. 970 (1989)	7
Pacyna v. *United States*, No. 413-87C (Cl. Ct. Nov. 9, 1987)	6
Stoll v. *Gottlieb*, 305 U.S. 165 (1938)	10
Underwriters Nat'l Assurance Co. v. *North Carolina Guaranty Ass'n*, 455 U.S. 691 (1982)	10

Statutes and rule:

Tucker Act:	
28 U.S.C. 1346	3, 5, 8, 9
28 U.S.C. 1346(a)(2)	4
5 U.S.C. 702	6
10 U.S.C. 1552	3
28 U.S.C. 1295(a)(2)	5

Statutes and rule—Continued: Page

28 U.S.C. 1361 ..... 3, 5
28 U.S.C. 2401(a) 4, 5
Fed. R. Civ. P.:
Rule 60 ..... 10, 11
Rule 60(b)(4) 7, 11
Rule 60(b)(6) 7, 11

Miscellaneous:
18 C. Wright, A. Miller, & E. Cooper, *Federal Practice & Procedure* (1981) 10
Restatement (Second) of Judgments (1982) 10

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-1799

CLEMENT J. PACYNA, PETITIONER

v.

JOHN O. MARSH, JR., SECRETARY OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. A1-A3) is unpublished, but the decision is noted at 956 F.2d 1160 (Table). The decision of the district court (Pet. App. C1-C4) is also unpublished.

JURISDICTION

The judgment of the court of appeals was entered on January 24, 1992. A petition for rehearing was denied on February 20, 1992. Pet. App. B1-B2. The petition for a writ of certiorari was filed on May 8, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a former Army master sergeant who voluntarily retired from active duty in 1962 after completing 20 years of military service. Pet. Br. at 13 in *Pacyna* v. *Marsh*, No. 88-2026. In August 1951, while serving as a counter-intelligence agent in the Army, petitioner applied for a promotion to the position of warrant officer in the Counter-Intelligence Corps (CIC). *Ibid.* His superior officers, as well as a board of officers, recommended his selection, but the CIC ultimately did not approve the appointment because petitioner did not meet the educational requirement for the position.[1] In January 1952, petitioner's commanding officer informed him that his application had been rejected. Pet. App. F1-F2. Petitioner took no action to challenge this decision at any time between 1952 and his voluntary retirement from the Army ten years later. Pet. App. D2.

Seventeen years after his retirement, in February 1979, petitioner requested and obtained his military personnel records from the Department of the Army. Pet. App. D2. The following year, on June 13, 1980, he applied to the Army Board for the Correction of Military Records ("ABCMR" or "Board") and sought to have his records changed to reflect a pro-

---

[1] Under Army and CIC regulations in force at the time, an applicant for warrant officer needed to have completed two years of college or the equivalent. Gov't Br. in Opp. at 2 n.1 in *Pacyna* v. *Marsh*, No. 86-1136. Petitioner left high school in the ninth grade and later obtained a high school equivalency certificate. *Ibid.* Although an applicant could request a waiver of this requirement, petitioner's records do not indicate that he made such a request. *Ibid.* Moreover, it was determined at the time that petitioner's record would not have justified an educational waiver in any event. *Ibid.*

motion to warrant officer retroactive to 1952. *Ibid.* The Board solicited and obtained an advisory opinion concerning petitioner's request from the Judge Advocate General of the Army. *Ibid.* That opinion, which recommended that petitioner's request be denied, was forwarded to petitioner for his comments. Pet. App. D2-D3.

On February 25, 1981, following full review of petitioner's application, his response to the Judge Advocate General's opinion, his military records, and other material, the Board concluded that petitioner had failed to furnish any material evidence which indicated that the 1952 decision not to promote him to warrant officer was in any way unlawful or unjust. Pet. App. D3; Gov't Br. in Opp. at 3 in *Pacyna* v. *Marsh*, No. 86-1136. Accordingly, the Board denied petitioner's application and notified him of the decision. Petitioner sought reconsideration of the Board's decision on four separate occasions, and each of those requests was denied. 86-1136 Gov't Br. in Opp. at 3-4.

2. a. On February 23, 1983, petitioner filed suit against respondent John O. Marsh, Jr., in the United States District Court for the Western District of New York. Gov't C.A. App. 5. He alleged that the district court's jurisdiction was based on the Tucker Act, 28 U.S.C. 1346, the mandamus statute, 28 U.S.C. 1361, and the statute that authorizes administrative correction of military records, 10 U.S.C. 1552. Gov't C.A. App. 2. Petitioner claimed that the denial of his appointment application constituted an abuse of discretion, violated his due process rights, and was arbitrary and capricious; he also claimed that he had been denied the promotion in violation of applicable Army regulations. Gov't C.A. App. 3-4. Petitioner sought a correction of his military records to reflect

a promotion to warrant officer in 1952, an award of back pay retroactive to that date, and increased retirement pay. *Id.* at 5; Pet. App. D3-D4. After the government asserted that the district court lacked jurisdiction to hear the claim because petitioner was demanding more than $10,000 in monetary damages from the Army,[2] petitioner waived any claim to damages in excess of that amount to preserve jurisdiction in the district court. Gov't C.A. App. 21; Pet. App. D6-D7; see 28 U.S.C. 1346(a)(2) (granting district court jurisdiction, concurrent with the jurisdiction of the Claims Court, over non-tort claims against the United States "not exceeding $10,000 in amount").

The district court granted the government's motion for summary judgment and dismissed petitioner's complaint. Pet. App. D1-D7. The court held that petitioner's claim had accrued, at the latest, when he retired from the Army in 1962, and hence his claim was barred by 28 U.S.C. 2401(a), which establishes a six-year statute of limitations for civil actions against the United States. Pet. App. D4-D6. The court rejected petitioner's argument that his damages claim had been "revived" by the ABCMR's 1982 decision, and noted that acceptance of this argument "would permit a plaintiff * * * to avoid the jurisdictional bar every time he submitted an application which was considered by the Board." Pet. App. D6.

b. The United States Court of Appeals for the Second Circuit affirmed in an unpublished order, and petitioner filed a petition for a writ of certiorari. In the opposition to that petition (No. 84-1706), the government conceded that there was a jurisdictional defect in the decision of the Second Circuit. Specifically, the government noted that petitioner had relied

---

[2] See Gov't C.A. App. 19 in *Pacyna* v. *Marsh*, No. 84-6200 (2d Cir.) (Mem. in Support of Gov't Mot. to Dis.).

on 28 U.S.C. 1346 to establish district court jurisdiction over his damages claim; that the district court had expressly found jurisdiction under that Section; and that petitioner therefore should have appealed to the United States Court of Appeals for the Federal Circuit, not the Second Circuit. Gov't Br. in Opp. at 4-5 in *Pacyna* v. *Marsh*, No. 84-1706; see 28 U.S.C. 1295(a)(2) (granting Federal Circuit exclusive jurisdiction over an appeal from the final decision of a district court when the district court's jurisdiction was based, in whole or part, on 28 U.S.C. 1346).

The government argued that the jurisdictional defect was not sufficiently important to justify exercise of this Court's discretionary power to vacate the judgment of the court of appeals and to order the court of appeals to transfer the case to the Federal Circuit. 84-1706 Gov't Br. in Opp. at 5. Nonetheless, this Court granted certiorari, vacated the judgment, and remanded the case to the court of appeals "to transfer the case pursuant to 28 U.S.C. § 1631 to the United States Court of Appeals for the Federal Circuit. See 28 U.S.C. § 1295(a)(2)." *Pacyna* v. *Marsh*, 474 U.S. 1078 (1986).

c. The Federal Circuit unanimously affirmed the district court in an unpublished per curiam opinion. 88-2026 Gov't Br. in Opp. at 5. It held that petitioner's claim had accrued in 1952 when he was denied the appointment to warrant officer and that his complaint was therefore barred by the six-year statute of limitations in 28 U.S.C. 2401(a). 88-2026 Gov't Br. in Opp. at 5. The court further held that resort to review before the ABCMR did not revive a claim for monetary damages already barred by a statute of limitations. *Ibid.*

Petitioner again filed a petition for a writ of certiorari. This Court denied the writ, as well as peti-

tioner's subsequent request for rehearing. *Pacyna* v. *Marsh*, 481 U.S. 1048 (1987); *Pacyna* v. *Marsh*, 483 U.S. 1034 (1987).

.d. Petitioner continued to litigate despite entry of a final judgment. Petitioner first filed an action in the United States Claims Court. That action was later voluntarily dismissed without prejudice. *Pacyna* v. *United States*, No. 413-87C (Cl. Ct. Nov. 9, 1987).

Subsequently, petitioner filed yet another action in the United States District Court for the Western District of New York. This time he filed suit against respondents John O. Marsh, Jr., and John W. Matthews, in their respective capacities as Secretary of the Army and Executive Secretary of the Board, as well as against the Army Board for the Correction of Military Records. Petitioner asserted jurisdiction under 5 U.S.C. 702, 10 U.S.C. 1552, and 28 U.S.C. 1361, and also asserted that his "§ 702 claim has had no prior court review." 88-2026 Gov't Br. in Opp. at 6.

The district court dismissed the complaint with prejudice on the ground that petitioner's claim was barred by the doctrine of *res judicata*. 88-2026 Pet. Br. App. at C1-C7. The court found that "[t]he factual allegations in both complaints are virtually identical; it appears that the plaintiff copied the instant complaint from the previous one which had been prepared by an attorney. The only distinctions are the way the claim for relief is phrased and the addition of another defendant." 88-2026 Pet. Br. at C4-C5. "These distinctions," the court stated, "do not change the fact that the plaintiff is again attempting to get judicial review of the same old decision by the United States Army." Pet. App. C5.

The court of appeals affirmed "substantially for the reasons stated" by the district court. 88-2026 Pet. Br.

App. at A2. Petitioner filed a petition for rehearing, which was denied. 88-2026 Pet. Br. App. at B1-B2. Thereafter, he filed his third petition for a writ of certiorari, which this Court denied. *Pacyna* v. *Marsh*, 493 U.S. 819 (1989). Petitioner's subsequent request for rehearing also was denied. *Pacyna* v. *Marsh*, 493 U.S. 970 (1989).

e. In an apparent attempt to remove the *res judicata* bar, petitioner returned once again to the district court, and filed a motion pursuant to Rule 60(b)(4) and (6), Fed. R. Civ. P., which asked for relief from the March 8, 1984, judgment dismissing his first action. He argued, *inter alia*, that the March 7, 1984, order was void for want of jurisdiction. Pet. App. C1.

The district court denied the motion. Pet. App. C1-C4. It observed that "[w]ithout question, Mr. Pacyna had adequate opportunity to challenge the subject matter of this court during the initial proceedings but has failed to do so." Pet. App. C3-C4. Recognizing that "Rule 60(b) should only be invoked upon a showing of exceptional circumstances," *ibid.*, the district court found that "[e]xceptional circumstances are not shown here." Pet. App. C4.

The court of appeals affirmed in a summary order. It recognized that petitioner "renew[ed] his challenge to * * * [the March 8, 1984] judgment in order to vitiate its *res judicata* effect upon his subsequent suit, which was also dismissed by the District Court." Pet. App. A2. The court of appeals held that "[d]enial of the Rule 60(b) motion was well within the District Court's discretion." Pet. App. A3. The court explained that the 1984 judgment could not be collaterally attacked for want of subject matter jurisdiction because the district court's exercise of jurisdiction

was in all likelihood correct and, in any event, was not a clear usurpation of jurisdiction. *Ibid.*

DISCUSSION

In this, his fourth petition for a writ of certiorari, petitioner challenges the lower courts' refusal to grant relief from a judgment now more than eight years old so he can again contest the Army's 1952 decision not to promote him to warrant officer. The court of appeals' conclusion that the district court did not abuse its discretion by denying relief to petitioner is correct and is fully justified under well settled principles of law. Accordingly, further review is not warranted.

1. Petitioner argues (Pet. 7) that "[t]he jurisdictional issue, as such, did not surface until Petitioner brought his motion for relief from the void judgment and order-opinion under Fed. R. Civ. Proc. Rule 60(b)(4) [and] (6) in 1991." That is untrue. In his third petition for a writ of certiorari (No. 88-2026) (which sought review of the dismissal of petitioner's second lawsuit), petitioner specifically claimed, *inter alia*, that the district court did not have jurisdiction over his original lawsuit filed under 28 U.S.C. 1346. Petitioner grounded that jurisdictional claim on the assertions that: 1) his promotion claim was in effect a contract claim, despite the fact that there was no express or implied contract between himself and the government; and 2) that no court has the power to order that former service members be promoted, and therefore, the original district court's decision and all subsequent court decisions in his cases should be vacated.

In the brief in opposition to that petition (No. 88-2026), the government demonstrated that the issue of subject matter jurisdiction had been litigated in petitioner's first lawsuit. The government showed that

petitioner invoked jurisdiction under 28 U.S.C. 1346 in the initial district court action.[3] Respondent challenged the jurisdictional basis in a motion to dismiss; petitioner defended his reliance on Section 1346 in opposition to that motion; and the district court then expressly determined that it had jurisdiction under Section 1346. After this Court ordered the case transferred to the Federal Circuit, that court affirmed the district court's judgment, thereby implicitly upholding that court's assertion of jurisdiction under Section 1346. This Court subsequently denied review. 493 U.S. 819 (1989).

As the government explained in its brief in opposition to petitioner's third petition for a writ of certiorari, petitioner's jurisdictional arguments are barred

---

[3] Petitioner has misrepresented the facts surrounding his initial lawsuit in additional respects. First, he has neglected to mention that his complaint specifically pled 28 U.S.C. 1346 as one of the jurisdictional bases, and that, in that complaint, he specifically requested that his "Application for Appointment for Warrant Officer be ordered granted, and that the Defendant be directed to make payments of retirement pay, including back payments from the date plaintiff's application was initially denied, at a rate commensurate with the retired rank of Warrant Officer." Gov't C.A. App. 2, 5.

Petitioner is also being less than candid in challenging the original district court's finding that he had waived his claim to any monetary award over $10,000, when he states that he "made no such waiver on any claim enforceable against the United States." Pet. 9. In fact, in his opposition to respondent's motion to dismiss the original lawsuit, petitioner stated that "[i]n the event the amount of damages are subsequently determined to be in excess of Ten Thousand ($10,000) Dollars, Plaintiff is willing to waive such excess damages in order to maintain jurisdiction at the District Court. Such waivers of 'excess' damages are a recognized means to stay in the jurisdiction of this Court." Gov't C.A. App. 21.

by the doctrine of *res judicata*. It is well-settled that "[t]he principles of *res judicata* apply to questions of [subject matter] jurisdiction as well as to other issues." *Underwriters Nat'l Assurance Co.* v. *North Carolina Guaranty Ass'n*, 455 U.S. 691, 706 (1982) (quoting *American Surety Co.* v. *Baldwin*, 287 U.S. 156, 166 (1932)); see also *Insurance Corp.* v. *Compagnie des Bauxites*, 456 U.S. 694, 702 n.9 (1982); Restatement (Second) of Judgments § 12 (1982); 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice & Procedure* § 4428 (1981). As this Court explained in *Stoll* v. *Gottlieb*, 305 U.S. 165, 172 (1938), "[i]t is just as important that there should be a place to end as that there should be a place to begin litigation. After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined." In addition, the government observed in that third brief in opposition that the purposes of *res judicata*—"reliev[ing] parties of the cost and vexation of multiple lawsuits, conserv[ing] judicial resources, and, by preventing inconsistent decisions, encourag[ing] reliance on adjudication" (*Allen* v. *McCurry*, 449 U.S. 90, 94 (1990))—were fully served by application of the *res judicata* doctrine to petitioner's second lawsuit. 88-2026 Gov't Br. in Opp. at 9-10.

The government's argument as to the applicability of *res judicata* principles is fully applicable here. See *Nemaizer* v. *Baker*, 793 F.2d 58 (2d Cir. 1986). The purposes of the doctrine are equally served by its application to this latest round of litigation, and it is beyond dispute, as the court of appeals so found, that the district court did not abuse its discretion in refusing to grant petitioner's Rule 60 motion for relief

from the original district court judgment in this case.[4] Pet. App. A2-A3.

2. Petitioner also claims (Pet. 19) that the district court erred in concluding that his original suit was barred by the statute of limitations. In petitioner's view, the statute of limitations did not begin to run until the ABCMR issued its decision in 1982. Pet. 19-20. This argument is not new either. In the most-recent brief in opposition, the government explained that a decision that a claim is barred by the statute of limitations is a judgment "on the merits" for *res judicata* purposes. The government also showed that the district court's original decision was correct in finding the petitioner's claim time-barred. 88-2026 Gov't Br. in Opp. at 9-10. We do not repeat that discussion here, but refer the Court to the government's second and third Briefs in Opposition. Accordingly, the district court committed no abuse of discretion in refusing to grant petitioner's Rule 60 motion on the basis of petitioner's allegations that his initial suit was not time-barred.

3. Finally, and despite petitioner's protestations to the contrary, it is clear that the petitioner is challenging the Army's 40 year old decision not to promote him to warrant officer rather than the ABCMR's re-

---

[4] The district court's original conclusion that it had jurisdiction under the Tucker Act was correct. Petitioner expressly asserted a claim for back pay, and that claim, if cognizable at all, is cognizable only under the Tucker Act. See *Mitchell* v. *United States*, 930 F.2d 893, 894-895 (Fed. Cir. 1991). Because the district court's decision regarding jurisdiction was correct, it cannot be said that that court "plainly usurped" jurisdiction. Hence petitioner was not entitled to relief under Rule 60(b)(4), Fed. R. Civ. P. *Nemaizer*, 793 F.2d at 65. Similarly, petitioner failed to demonstrate that extraordinary circumstances existed which otherwise would warrant relief under Rule 60(b)(6), Fed. R. Civ. P.

fusal to change his military records.[5] Petitioner has still failed, however, to offer any reason why he was entitled to a promotion in 1952 despite his lack of educational qualifications for the position of warrant officer. As the Board concluded, petitioner has not explained "why the action not to appoint him was illegal or in violation of regulations." 88-2026 Pet. Br. App. at D3. Thus, whatever action this Court were to take on the petition now before it, the end result of this litigation would be the same.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General
STUART M. GERSON
Assistant Attorney General
WILLIAM KANTER
MARY K. DOYLE
Attorneys

JULY 1992

---

[5] In his petition (at 23), petitioner claims that "no notification was given of the reasons for the disapproval," citing a 1982 letter from the Office of the Assistant Secretary of the Army. First, to the extent that petitioner is claiming that the correction board did not explain its reasoning, he is mistaken. See Gov't C.A. App. 41-43 in *Pacyna* v. *Marsh*, No. 84-6200 (2d Cir.). Second, based on the statement of facts contained in petitioner's last petition, it appears that he is really referring to the Army's 1952 letter advising him of its decision not to promote him. See 88-2026 Pet. Br. at 13-14.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 312324 45509